UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GREGORY A. BRADFORD, Plaintiff, v. FLAGSHIP FACILITY SERVICES INC, Defendant.	Case No. 17-CV-01245-LHK **ORDER GRANTING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND TO DISMISS THE ACTION AND DENYING AS MOOT DEFENDANT'S ALTERNATIVE MOTION TO STAY** Re: Dkt. No. 11

Plaintiff Gregory Bradford ("Plaintiff"), on behalf of himself and others similarly situated, sues Flagship Facility Services Inc. ("Defendant") for unpaid wages. Before the Court is Defendant's Motion to Compel Arbitration and to Dismiss the Action or, in the Alternative, Stay the Action Pending Arbitration. ECF No. 11 ("Mot."). Having considered the parties' briefing, the relevant law, and the record in this case, the Court GRANTS Defendant's Motion to Compel Arbitration and Dismiss the Action, and DENIES as moot Defendant's Alternative Motion to Stay the Action Pending Arbitration.

I. BACKGROUND

A. Factual Background

Defendant is a "dedicated facility maintenance company that provides services that include but are not limited to, janitorial services, facility maintenance, and food services to various companies across California." ECF No. 1, Complaint ("Compl.") ¶ 13. "Plaintiff was employed by Defendant[] . . . performing duties relating to food handling, preparation, and cooking to serve businesses that request said services." *Id.* ¶ 12. Plaintiff originally started working for Defendant in 2008. *Id.* However, after a period of separation from the company, Plaintiff was rehired by Defendant as a cook in April 2012. ECF No. 11-2, Declaration of Ralph Covarrubias ("Covarrubias Decl.") ¶ 5 ("Plaintiff had been employed by Flagship prior to April 2012, but then he left Flagship and was rehired in April 2012.").

During the hiring process, Plaintiff was issued a number of documents. One of those documents was an arbitration agreement titled "Dispute Resolution Policy." Covarrubias Decl. Ex. C ("Dispute Policy"). Plaintiff also signed a form in which Plaintiff agreed that "I, Gregory Bradford, received a copy of, had the opportunity to ask questions about, do understand and agree to abide by each of the following documents I have initialed below." Covarrubias Decl. Ex. B. Plaintiff then signed his initials next to a line that stated "Dispute Resolution." *Id.*

The Dispute Resolution Policy "applies to any dispute arising out of or related to Employee's employment or termination of employment." Dispute Policy ¶ 1. Moreover, the Dispute Resolution Policy states that it "is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law, and therefore this Policy requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial." *Id.* The Dispute Resolution Policy also specifies that "there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action" (hereinafter, "class and collective action waiver"). *Id.* ¶ 5.

B. Procedural History

On October 25, 2016, Plaintiff filed a suit in California Superior Court for Santa Clara County in which Plaintiff sought damages for violation of various California Labor Code wage and hour provisions. *See* ECF No. 12 ("Request for Judicial Notice") Ex. 1.[1] On February 17, 2017, the California Superior Court for Santa Clara County granted Plaintiff's Request for Dismissal of the Entire Action without prejudice. *Id.* Ex. 2.

On March 9, 2017, Plaintiff filed the instant class and collective action suit. *See* Compl. Plaintiff brings six causes of action for (1) Failure to Pay Overtime Wages in violation of California Labor Code § 510, (2) Failure to Provide Meal Periods in violation of California Labor Code § 226.7, (3) Failure to Authorize Rest Periods in violation of California Labor Code § 226.7, (4) Failure to Pay Wages in a Timely Manner in Violation of California Labor Code § 203, (5) Unfair Competition in violation of California Business & Professions Code §§ 17200, *et seq.*, and (6) Failure to Pay Overtime Wages in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 206, *et seq.* *Id.* ¶¶ 42–75. Plaintiff brings this suit on behalf of the following class: "Any and all persons who are or were employed in non-exempt positions, however titled, by Defendants in the state of California within four (4) years prior to the filing of the complaint in this action until resolution of this lawsuit." *Id.* ¶ 22. Plaintiff also brings this suit as a FLSA collective action on behalf of the following collective class:

> All hourly-paid, non-managerial employees of Flagship Facility Services, Inc., in the State of California from March 2014 to the present who both (a) have at least one Workweek for which they were paid for 40 or more hours, as reflected in Flagship Facility Services, Inc.'s payroll records, during the time period between July 2013 through the present, and (b) opt in to the proposed FLSA collective action.

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[1] Defendant seeks judicial notice of the complaint in the October 25, 2016 suit filed in the California Superior Court for Santa Clara County. *See* Request for Judicial Notice ¶¶ 1. Defendant also seeks judicial notice of the California Superior Court Order Granting Plaintiff's Request for Dismissal of the Entire Action without prejudice. *Id.* ¶ 2. Public records, including judgments and other publicly filed documents, are proper subjects of judicial notice. *See, e.g.*, *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) ("[Courts] may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue."); *see also* Fed. R. Evid. 201(b). However, to the extent any facts in documents subject to judicial notice are subject to reasonable dispute, the Court will not take judicial notice of those facts. *See Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) ("A court may take judicial notice of matters of public record . . . But a court may not take judicial notice of a fact that is subject to reasonable dispute.") (internal quotation marks omitted), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002). Accordingly, the Court GRANTS Defendant's request for judicial notice.

Id. ¶ 28.

On May 5, 2017, Defendant brought the instant Motion to Compel Arbitration and to Dismiss the Action or, in the Alternative, Stay the Action Pending Arbitration. *See* Mot. On May 19, 2017, Plaintiff filed an opposition, ECF No. 27 ("Opp'n"), and on May 26, 2017, Defendant filed a reply, ECF No. 29 ("Reply").

II. LEGAL STANDARD

The Federal Arbitration Act ("FAA") applies to arbitration agreements in any contract affecting interstate commerce. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); 9 U.S.C. § 2. Under Section 3 of the FAA, "a party may apply to a federal court for a stay of the trial of an action 'upon any issue referable to arbitration under an agreement in writing for such arbitration.'" *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) (quoting 9 U.S.C. § 3). If all claims in litigation are subject to a valid arbitration agreement, the court may dismiss or stay the case. *See Hopkins & Carley, ALC v. Thomson Elite*, 2011 WL 1327359, at *7–8 (N.D. Cal. Apr. 6, 2011).

The FAA states that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In deciding whether a dispute is arbitrable, a court must answer two questions: (1) whether the parties agreed to arbitrate, and, if so, (2) whether the scope of that agreement to arbitrate encompasses the claims at issue. *See Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). If a party seeking arbitration establishes these two factors, the court must compel arbitration. *Id.*; 9 U.S.C. § 4. "The standard for demonstrating arbitrability is not a high one; in fact, a district court has little discretion to deny an arbitration motion, since the [FAA] is phrased in mandatory terms." *Republic of Nicar. v. Std. Fruit Co.*, 937 F.2d 469, 475 (9th Cir. 1991). In cases where the parties "clearly and unmistakably intend to delegate the power to decide arbitrability to an arbitrator," the court's inquiry is "limited . . . [to] whether the assertion of arbitrability is 'wholly groundless.'" *Qualcomm Inc. v. Nokia Corp.*, 466

F.3d 1366, 1371 (Fed. Cir. 2006) (applying Ninth Circuit law). Nonetheless, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [s]he has not agreed so to submit." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

The FAA creates a body of federal substantive law of arbitrability that requires a healthy regard for the federal policy favoring arbitration and preempts state law to the contrary. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475–79 (1989) ("[T]he FAA must be resolved with a healthy regard for the federal policy favoring arbitration."). However, "state law is not entirely displaced from federal arbitration analysis." *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936–37 (9th Cir. 2001). When deciding whether the parties agreed to arbitrate a certain matter, courts generally apply ordinary state law principles of contract interpretation. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("Courts generally should apply ordinary state-law principles governing contract formation in deciding whether [an arbitration] agreement exists."). Parties may also contract to arbitrate according to state rules, so long as those rules do not offend the federal policy favoring arbitration. *Volt*, 489 U.S. at 476, 478–79 (looking to whether state rules "offend[ed] the rule of liberal construction" in favor of arbitration). Thus, in determining whether parties have agreed to arbitrate a dispute, the court applies "general state-law principles of contract interpretation, while giving due regard to the federal policy in favor of arbitration by resolving ambiguities as to the scope of arbitration in favor of arbitration." *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1044 (9th Cir. 2009) (quoting *Wagner v. Stratton Oakmont, Inc.*, 83 F.3d 1046, 1049 (9th Cir. 1996)). "[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985). If a contract contains an arbitration agreement, there is a "presumption of arbitrability," *AT & T*, 475 U.S. at 650, and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S.

1, 24–25 (1983).

III. DISCUSSION

Defendant argues that the Dispute Resolution Policy to which Defendant agreed requires arbitration on an individual basis. Mot. at 3. Defendant also argues that the arbitrability of the instant suit should be determined through arbitration in the first instance. *Id.* at 5.

In response, Plaintiff does not dispute that Plaintiff and Defendant entered into an arbitration agreement. Plaintiff also does not dispute that the scope of the Dispute Resolution Policy includes the claims in the instant suit. Instead, Plaintiff argues that the Dispute Resolution Policy is substantively unconscionable because it includes a class and collective action waiver that interferes with Plaintiff's right to engage in concerted activity under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* Plaintiff also argues that the Dispute Resolution Policy is substantively unconscionable because it lacks mutuality. Plaintiff further argues that the Dispute Resolution Policy is procedurally unconscionable because the Dispute Resolution Policy was provided to Plaintiff on a take-it-or-leave it basis. Finally, Plaintiff argues that compelling arbitration would result in impermissible claim splitting.

The Court first addresses Defendant's argument that arbitrability should be decided through arbitration rather than through court proceedings. Second, the Court addresses whether the NLRA renders Plaintiff's claims substantively unconscionable. Third, the Court addresses whether the Dispute Resolution Policy is procedurally or substantively unconscionable for reasons other than the NLRA. Finally, the Court addresses whether compelling arbitration would result in impermissible claim splitting.

A. Arbitrability Determination

Defendant argues that "an arbitrator, and not this Court, should decide whether Plaintiff's claims must be resolved . . . in arbitration." Mot. at 10. As noted above, in cases where the parties "clearly and unmistakably intend to delegate the power to decide arbitrability to an arbitrator," the court's inquiry is "limited . . . [to] whether the assertion of arbitrability is 'wholly groundless.'" *Qualcomm Inc.*, 466 F.3d at 1371. Defendant argues that the broad scope of the Dispute Resolution Policy indicates a "clear[] and unmistakeabl[e] inten[t]" to delegate the power to decide arbitrability to an arbitrator. *Id.*

Defendant relies on *Meadows v. Dickey's Barbecue Restaurants Inc.*, 144 F. Supp. 3d 1069 (N.D. Cal. 2015). In *Meadows*, a district court in this district held that the issue of arbitrability had been clearly and unmistakeably delegated to an arbitrator where the arbitration agreement specified "that disputes regarding 'any provision of this Agreement' or 'the validity of this Agreement or any other agreement between the parties, or any provision thereof' must be 'submitted for binding arbitration . . . .'" *Id.* at 1076.

Here, the Dispute Resolution Policy covers "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." Dispute Policy ¶ 1. Moreover, the Dispute Resolution Policy specifies that it covers "without limitation disputes arising out of or relating to interpretation of or application of this Policy, *but not as to the enforceability, revocability or validity of the Policy or any portion of the Policy*." *Id.* (emphasis added). Furthermore, the provision discussing the class and collective action waiver specifically states that "any claim that all or part of this [class and collective action waiver] is unenforceable, void or voidable may be determined only by a court and not by an arbitrator." *Id.* ¶ 5.

Thus, the Dispute Resolution Policy states that a dispute about the "enforceability" and "validity" of the Dispute Resolution Policy is not subject to arbitration. Moreover, the class and collective action waiver specifically states that determinations whether the class and collective action waiver is "unenforceable, void or voidable" must be decided by a court. Therefore, the parties have not clearly and unmistakeably delegated the power to decide arbitrability to an arbitrator. In fact, the terms of the Dispute Resolution Policy indicate that the parties agreed to resolve disputes like those at issue in the instant motion through court proceedings. Accordingly, the Court, and not an arbitrator, must determine arbitrability.

B. Substantive Unconscionability Because of the Class and Collective Action Waiver's Interference with Plaintiff's NLRA Rights

Plaintiff argues that the Dispute Resolution Policy is substantively unconscionable, because the class and collective action waiver in the policy interferes with Plaintiff's NLRA rights. A contract provision is "unconscionable, and therefore unenforceable, only if it is both procedurally and substantively unconscionable." *In re iPhone Application Litig.*, 2011 WL 4403963, at *7 (N.D. Cal. Sept. 20, 2011) (citing *Armendariz v. Fountain Health Psychare Servs., Inc.*, 24 Cal. 4th 83, 114 (Cal. 2000), *abrogated on other grounds by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)). "The substantive element of unconscionability focuses on the actual terms of the agreement and evaluates whether they create 'overly harsh' or 'one-sided results as to 'shock the conscience.'" *Id.*

As an initial matter, although Plaintiff argues that the agreement is "substantively unconscionable" because the class and collective action waiver interferes with Plaintiff's NLRA rights, the case law discussing NLRA rights and class and collective action waivers usually addresses the issue as a question of whether an arbitration agreement with such a waiver is "unenforceable" or not. Whether the issue is considered as one of "enforceability" or as one of "substantive unconscionability," the underlying issue is whether the class or collective action waiver violates Plaintiff's NLRA rights. For the sake of simplicity and alignment with the case law discussing NLRA rights, the Court uses the "unenforceable" terminology in the remainder of this section.

First, the Court discusses the legal framework for when the NLRA renders an arbitration agreement unenforceable. Second, the Court discusses whether the NLRA causes the Dispute Resolution Policy to be unenforceable.

1. Legal Framework

Section 7 of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, provides employees the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection," *D.R. Horton*, 357 NLRB No. 184 (2012), which includes the right to "seek to improve working conditions through resort to administrative and judicial forums," *Eastex, Inc. v. NLRB*, 437 U.S.

556, 566 (1978). In *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016), the Ninth Circuit held that the right to engage in concerted activity "is the essential, substantive right established by the NLRA." *Id.* at 980. As a result, the *Morris* court held that an arbitration agreement that requires an employee to "pursue work-related claims individually and, no matter the outcome, [to be] bound by the result . . . is the 'very antithesis' of § 7's substantive right to pursue concerted work-related legal claims." *Id.* at 983–85 (citing *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1155 (7th Cir. 2016)). The *Morris* court specifically addressed a "concerted action waiver"—a waiver of the right to bring concerted legal claims, i.e., collective or class action claims, in any forum—in an arbitration agreement, and held that such concerted action waivers are unenforceable because they violate the right to engage in concerted activity under the NLRA. *Id.* The *Morris* court held that a provision in an arbitration agreement is an unenforceable concerted action waiver where the terms of the provision "prevent[] concerted activity by employees in arbitration proceedings"; "require that employees only use arbitration"; and "prevent[] the initiation of concerted legal action anywhere else." *Id.*; *see also Coppernoll v. Hamcor, Inc.*, 2017 WL 446315, at *1 (N.D. Cal. Jan. 17, 2017) ("Because all legal claims had to be arbitrated and arbitration could only be conducted individually, this was an unenforceable concerted action waiver.").

However, *Morris* recognized that an arbitration agreement that precludes the ability to bring "concerted legal actions" may still be enforceable where "the employee . . . could have opted out of the individual dispute resolution agreement and chose not to." *Morris*, 834 F.3d at 982 n.4 (citing *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1076 (9th Cir. 2014)). In *Johnmohammadi*, the Ninth Circuit addressed circumstances where the plaintiff sought to invalidate an arbitration agreement based on the Plaintiff's § 7 NLRA right to concerted activity. *Johnmohammadi*, 755 F.3d at 1076. The *Johnmohammadi* court held that for such invalidation to occur, the plaintiff had the burden of showing that the arbitration agreement "interfered with, restrained, or coerced [the plaintiff] in the exercise of her [NLRA] right to file a class action."[2] *Id.*

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[2] Although the waiver in *Johnmohammadi* was referred to as a class action waiver, it also was a

Under that standard, the *Johnmohammadi* court first held that the arbitration agreement in that case did not "interfer[e] with or restrain[]" this NLRA right despite the arbitration agreement's class action waiver because the plaintiff had been provided the opportunity to opt out of the arbitration agreement. *Id.* Specifically, the plaintiff's hiring paperwork stated that the plaintiff "agreed to resolve all employment-related disputes through arbitration unless [the plaintiff] returned an enclosed form within 30 days electing, as the form put it, 'NOT to be covered by the benefits of Arbitration.'" *Id.* The Ninth Circuit held that this opportunity to opt out of the arbitration agreement meant that the class and collective action waiver did not interfere with the plaintiff's NLRA right to concerted activity. *Id.* at 1075–76 ("If she wanted to retain that right, nothing stopped her from opting out of the arbitration agreement.").

Second, the *Johnmohammadi* court held that the plaintiff had not been "coerced" into giving up the plaintiff's NLRA right to concerted activity because the defendant "did not require [the plaintiff] to accept a class-action waiver as a condition of employment." *Id.* Additionally, the plaintiff had made her election "free of any express or implied threats of termination or retaliation if she decided to opt out of arbitration." *Id.*

District courts in the Ninth Circuit applying *Morris* and *Johnmohammadi* have held that the NLRA does not render a class and collective action waiver unenforceable if the employee had a "meaningful opportunity" to opt out of the collective and class action waiver or the arbitration agreement. *Echevarria v. Aerotek, Inc.*, 2017 WL 24877, at *2 (N.D. Cal. Jan. 3, 2017). For example, in *Bonner v. Michigan Logistics Inc.*, 2017 WL 1407675 (D. Ariz. Apr. 20, 2017), a district court in the District of Arizona held that an opt out provision was sufficient to prevent *Morris*'s application. *Id.* at *8 ("[*Morris*'s] holding does not apply when the employee had a right to opt out of the concerted action waiver."). The opt out provision in *Bonner* provided that the employee "may opt out of this Arbitration Provision by notifying [the defendant] in writing of [the

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waiver of the "right to pursue employment-related claims on a collective basis in any forum, judicial or arbitral." *Johnmohammadi*, 755 F.3d at 1074. Thus, it is the kind of concerted activity waiver to which *Morris* would normally apply.

employee's] desire to opt out of this Arbitration Provision." *Id.* The opt out provision had to be mailed or hand delivered and was to be "postmarked within 30 days" of the execution of the Arbitration Provision. *Id.* The *Bonner* court held that this opt out provision was sufficient to prevent the application of *Morris* under *Johnmohammadi*.

In contrast, in *Echevarria*, a district court in this district held that an arbitration agreement did not provide a meaningful opportunity to opt out because "Aerotek's online application process not only failed to inform Echevarria that he could opt out of the Mutual Arbitration Agreement, but the Mutual Arbitration Agreement stated expressly that it would be enforced *whether or not Echevarria signed it*." *Echevarria*, 2017 WL 24877, at *3 ("'[A]n employer does not provide employees a meaningful opportunity to opt out of an arbitration agreement when it fails to provide any opt-out procedures and does not otherwise explain to employees that they may opt out.'" (quoting *Gonzalez v. Ceva Logistics U.S., Inc.*, 2016 WL 6427866, at *5 (N.D. Cal. Oct. 31, 2016)). Similarly, in *Gonzalez*, a district court in this district held that the plaintiff was not provided a meaningful opportunity to opt out where the sole indication in an online application form that an opt out was available was a missing asterisk next to the boxes for e-signing the arbitration provision. *Gonzalez*, 2016 WL 6427866 at *5. The online application did not explain the significance of the asterisk or explain that employees may opt out of the arbitration agreement. *Id.* Thus, the *Gonzalez* court found that the online application did not provide a meaningful opportunity to opt out.

2. Whether the NLRA Causes the Dispute Resolution Policy to be Unenforceable in this Case

As noted above, the class and collective action waiver in this case states that "there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action." Dispute Policy ¶ 5. The parties do not dispute that absent an opt out provision, *Morris* would cause the Dispute Resolution Policy to be unenforceable because of interference with Plaintiff's NLRA right to concerted activity. However, the Dispute Resolution Policy provides the following opt out procedure:

> An Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Policy. The Employee must submit a signed and dated statement on a "Dispute Resolution Policy Opt Out Form" ("Form") that can be obtained from the Company's Human Resources Department, 1050 N. 5th Street, San Jose, California 95112. In order to be effective, the signed and dated Form must be returned to the Human Resources Department within 30 days of the Employee's receipt of this Policy. An Employee choosing to opt out will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies. Should an Employee not opt out of this Policy within 30 days of the Employee's receipt of this Policy, continuing the Employee's employment constitutes mutual acceptance of the terms of this Policy by Employee and the Company. An Employee has the right to consult with counsel of his/her choice concerning this Policy.

Id. ¶ 8.

For the following reasons, the Court finds that this opt out provision in the Dispute Resolution Policy provided Plaintiff a meaningful opportunity to opt out, and thus is not unconscionable because of the NLRA. First, just like *Johnmohammadi* and *Bonner*, and unlike *Echevarria* and *Gonzalez*, this opt out provision in the Dispute Resolution Policy clearly provides that employees have the ability to opt out of the Dispute Resolution Policy. *Id.* ("An Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Policy."). To do so, the opt out procedure requires an employee to obtain and return an opt out form to Defendant's Human Resources Department within 30 days of receiving the Dispute Resolution Policy.

Moreover, like in *Johnmohammadi*, the opt out provision in the instant case does not involve coercion. The Dispute Resolution Policy states that "[a]n Employee choosing to opt out will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies." Dispute Policy ¶ 8. Moreover, the provision explicitly informed Plaintiff that "[a]n Employee has the right to consult with counsel of his/her choice concerning this Policy." *Id.* Plaintiff does not argue or provide any evidence that there were "any express or implied threats of termination or retaliation if [he] decided to opt out of arbitration." *Johnmohammadi*, 755 F.3d at 1076. Moreover, when Plaintiff received the Dispute Resolution Policy, Plaintiff signed a form that stated that "I, Gregory Bradford, received a copy of, had the opportunity to ask questions about, do understand and agree to abide by [the Dispute Resolution Policy].” Covarrubias Decl. Ex. B.

Even though the Dispute Resolution Policy provides an opt out procedure that did not involve coercion, Plaintiff argues that the opt out provision provides no meaningful opportunity to opt out because its procedures are vague and burdensome. The Court acknowledges that even though the Dispute Resolution Policy provides the Human Resources Department’s address (in the opt out provision) and fax number (on the front of the Dispute Resolution Policy), it is not entirely clear what precise method employees are expected to use to obtain and return the opt out form (e.g., mail, in-person, fax, or through a Human Resources officer).[3] Regardless, district courts in this circuit have found no meaningful opportunity to opt out only where the employer either fails to provide any opt-out procedures or does not explain to employees that they may opt out. *Echevarria*, 2017 WL 24877 at *3; *Gonzalez*, 2016 WL 6427866 at *5. Neither circumstance is present here.

Moreover, even if the Dispute Resolution Policy is construed narrowly to require employees to go to the Human Resources Department in person, the Court does not find the opt out procedure to be so burdensome that Plaintiff had no meaningful opportunity to opt out. In *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201 (9th Cir. 2016), the Ninth Circuit held that: “While we do not doubt that it was more burdensome to opt out of the arbitration provision by overnight delivery service than it would have been by e-mail, the contract bound Uber to accept opt-outs from those drivers who followed the procedure it set forth.” *Id.* at 1210–11. The Court similarly does not find an in-person procedure to be so burdensome that Plaintiff had no meaningful opportunity to opt out. Moreover, Plaintiff does not argue, or provide evidence that, he wanted to opt out, but was somehow burdened by the opt out procedure.

Moreover, the Ninth Circuit in *Johnmohammadi* did not discuss explicitly whether the opt out procedure itself was burdensome, but held that "[i]n the absence of any coercion influencing the decision, we fail to see how asking employees to choose between [opting out or not opting out] can be viewed as interfering with or restraining their right to do anything." *Johnmohammadi*, 755 F.3d at 1076. Here, employees were provided an opportunity to opt out and, as discussed above, there is no evidence of coercion. Accordingly, the Court cannot conclude that the opt out provision was so burdensome that Plaintiff had no meaningful opportunity to opt out.

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[3] The Human Resources Department address in the Dispute Resolution Policy is in San Jose, California. Plaintiff resides in Palo Alto, California. Compl. ¶ 12.

Therefore, the Court finds that because "the employee . . . could have opted out of the individual dispute resolution agreement and chose not to," *Morris* does not render the Dispute Resolution Policy and its class and concerted action waiver unenforceable or substantively unconscionable. *Morris*, 834 F.3d at 982 n.4.

C. Unconscionability on Other Grounds

Plaintiff also argues that the Dispute Resolution Policy was substantively and procedurally unconscionable for other reasons besides the class and collective action waiver's conflict with Plaintiff's NLRA rights. The Court addresses each type of unconscionability in turn.

1. Substantive Unconscionability

Plaintiff argues that the Dispute Resolution Policy is substantively unconscionable because it lacks mutuality. "Substantive unconscionability addresses the fairness of the term in dispute." *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100–01 (2002). The focus of the inquiry is whether the term is one-sided and will have an overly harsh effect on the disadvantaged party. *Harper v. Ultimo*, 113 Cal. App. 4th 1402, 1407 (2003). Mutuality has been described as the "paramount" consideration when assessing substantive unconscionability. *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638 (2004). "Agreements to arbitrate must contain at least 'a modicum of bilaterality' to avoid unconscionability." *Id.* at 437 (quoting *Armendariz*, 24 Cal. 4th at 119) (some internal quotations omitted).

Defendant argues that the Dispute Resolution Policy does not lack mutuality because it applies to "[a]ny dispute arising out of or related to Employee's employment or termination of employment." Reply at 10. The California Supreme Court has held that broad language reaching "any dispute" is sufficiently broad to provide the "modicum of bilaterality" that is required under California law, as such broad language reaches suits brought by both employees and employers. In *Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237 (2016), the California Supreme Court held that an arbitration agreement was mutual where it applied to "any claim or action arising out of or in any way related to the . . . employment . . . of Employee." *Id.* at 1248–49. The language here—"Any dispute arising out of or related to Employee's employment or termination of employment"—is similarly broad, applies to both employer and employee initiated suits, and thus contains at least a "modicum of bilaterality" under *Baltazar*.

In response, Plaintiff does not argue that the terms of the Dispute Resolution Policy themselves lack mutuality or are one sided. Instead, Plaintiff argues that even though the Dispute Resolution Policy is equally applicable to Plaintiff and Defendant, the Dispute Resolution Policy still lacks mutuality because it is unlikely that any dispute covered by the Dispute Resolution Policy would be initiated by Defendant against Plaintiff. Thus, Plaintiff contends that "the only claims realistically affected by the arbitration agreement are those claims employees would bring against their employers." Opp'n at 6.

Plaintiff relies on *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), in which the Ninth Circuit stated that "[b]ecause the possibility that Circuit City would initiate an action against one of its employees is so remote, the lucre of the arbitration agreement flows one way: the employee relinquishes rights while the employer generally reaps the benefits of arbitrating its employment disputes." *Id.* at 1173–74. However, this statement is dicta. In *Ingle*, the terms of the arbitration agreement did not apply to the employer and employees equally because the arbitration agreement's scope was limited to "'any and all employment-related legal disputes, controversies or claims of an Associate,' thereby limiting its coverage to claims brought by employees." *Id.* at 1173. Moreover, intervening United States Supreme Court and California Supreme Court decisions cast some doubt as to whether *Ingle* is still good law. *See Assi v.*

Citibank Nat'l Ass'n, 2015 WL 166919, at *2 (N.D. Cal. Jan. 13, 2015) (noting that the parties disputed whether *Ingle* is still good law after the United States Supreme Court's decision in *Concepcion*, 563 U.S. 333); *Knatt v. J. C. Penney Corp., Inc.*, 2016 WL 1241550, at *3 (S.D. Cal. Mar. 30, 2016) (declining to follow *Ingle* in light of United States Supreme Court precedent); *see also Baltazar*, 62 Cal. 4th at 1248–49 (holding that dispute resolution policy had a "modicum of bilaterality" because the broad provision in the policy "clearly covers claims an employer might bring as well as those an employee might bring" without discussing whether an employer is actually likely to bring such claims against an employee).

However, the Court need not reach whether *Ingle* is or is not still good law. Even if *Ingle* applies, the record does not demonstrate that the possibility that Defendant would sue employees like Plaintiff is "so remote, the lucre of the arbitration agreement flows one way." *Ingle*, 328 F.3d at 1173–74. The Dispute Resolution Policy itself states that it applies to actions for "trade secrets" or "unfair competition." Moreover, in Defendant's reply, Defendant also points out that the Dispute Resolution Policy would cover disputes involving "theft of money or property" or "injury to reputation" that arose out of Plaintiff's employment. *See* Dispute Policy ¶ 1 (indicating that the Dispute Resolution Policy applied to "all other state statutory and common law claims" that "aris[e] out of or [are] related to Employee's employment or termination of employment"). Indeed, "an employer could have many reasons to sue an employee (or former employee): for fraud, for conversion, for interfering with the employer's business relationship with other employees, for property damage, for misappropriation of trade secrets, for overpaid wages, for defamation, for a restraining order . . . the list is limited only by the imagination of lawyers." *Avelar v. Seven Fifty-Four, Inc.*, 2015 WL 326719, at *8 (Cal. Ct. App. Jan. 26, 2015)[4]; *see also Baltazar*, 62 Cal. 4th at 1248 (holding that dispute resolution policy had a "modicum of bilaterality" because the broad provision in the policy "clearly covers claims an employer might bring as well as those an employee might bring"). Moreover, Plaintiff presents no evidence (besides the arguments in its briefing) that the possibility of a lawsuit against an employee like Plaintiff is "remote" or "implausible" as Plaintiff contends. Therefore, because the Dispute Resolution Policy applied equally to Plaintiff and Defendant and there are potential claims that Defendant could bring against employees like Plaintiff, the Dispute Resolution Policy provides the "modicum of bilaterality" required for mutuality under California law.

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[4] The *Avelar* opinion is unpublished and is therefore not precedent under the California Rule of Court 8.1115. However, the Court "may nonetheless rely on the unpublished opinion[] . . . to 'lend support'" to the idea that the Court's conclusion "accurately represents California law." *Emp'rs Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n.8 (9th Cir. 2003).

Accordingly, the Court finds that Plaintiff's non-NLRA arguments do not cause the Dispute Resolution Policy to be substantively unconscionable.

2. Procedural Unconscionability

Plaintiff argues that the Dispute Resolution Policy is procedurally unconscionable because of the inequality of bargaining power and absence of a meaningful choice. As noted above, for a contract to be unconscionable, California law requires it to be both procedurally and substantively unconscionable. *See In re iPhone Application Litig.*, 2011 WL 4403963 at *7 (requiring that a contract to be "both procedurally and substantively unconscionable."). Therefore, because the Court found above that the Dispute Resolution Policy is not substantively unconscionable, the Court need not reach the question of procedural unconscionability. However, for the sake of completeness, the Court addresses the issue.

"Procedural unconscionability focuses on the factors of surprise and oppression . . . ." *Kilgore v. KeyBank, Nat. Ass'n*, 718 F.3d 1052, 1059 (9th Cir. 2013) (en banc) (quoting *Harper*, 113 Cal. App. 4th at 1407). "Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice, while surprise involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006) (en banc). Moreover, the Ninth Circuit has held that "[t]he threshold inquiry in California's procedural unconscionability analysis is 'whether the arbitration agreement is adhesive.'"

Nagrampa, 469 F.3d at 1263 (quoting *Armendariz*, 24 Cal. 4th at 119).

In *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002), the Ninth Circuit held that an arbitration agreement with an opt-out provision was not procedurally unconscionable. *Id.* at 1199. The *Ahmed* court began its analysis by looking to whether the arbitration agreement was adhesive. The *Ahmed* court held that an arbitration agreement is "not adhesive if there is an opportunity to opt out of it," and that a 30-day opt out period provided a meaningful opportunity to opt out. *Uber*, 848 F.3d at 1206 (citing *Ahmed*, 283 F.3d at 1199). Second, the *Ahmed* court held that "apart from its non-adhesive nature, the arbitration agreement here also lacked any other indicia of procedural unconscionability." *Ahmed*, 283 F.3d at 1199. Specifically, the terms of the arbitration agreement "were clearly spelled out in written materials," the plaintiff "was encouraged to contact Circuit City representatives or to consult an attorney," and the plaintiff "was given 30 days to decide whether to participate in the program." *Id.* at 1199–1200.

Similarly, in *Kilgore*, the Ninth Circuit sitting en banc followed *Ahmed* and held that a 60 day opt out provision rendered the arbitration agreement to not be procedurally unconscionable. *Kilgore*, 718 F.3d at 1059. The *Kilgore* court also found it relevant that the arbitration clause at issue in *Kilgore* was not "buried in fine print." *Id.*; *see also Uber*, 848 F.3d at 1206 (holding that 30 day opt out provision requiring in person or overnight mail opt out caused delegation clause to not be procedurally unconscionable).

The facts here are similar to those in *Ahmed*, *Kilgore*, and *Uber*. First, for the reasons discussed in the NLRA substantive unconscionability section above, the Dispute Resolution Policy provided Plaintiff a meaningful opportunity to opt out of the policy with a 30 day opt out provision. Therefore, as in *Ahmed*, *Kilgore*, and *Uber*, the Dispute Resolution Policy was not a contract of adhesion.

Moreover, the Dispute Resolution Policy "lack[s] any other indicia of procedural unconscionability" that were found to be relevant in *Ahmed*, *Kilgore*, and *Uber*. *Ahmed*, 283 F.3d at 1199. First, as in *Ahmed*, the terms of the Dispute Resolution Policy in the instant case were "clearly spelled out in written materials." *Id.* Second, in the instant case, the Dispute Resolution Policy was not "hidden in a prolix printed form," but was an entirely separate two-page document with an all caps bolded title. *See Kilgore*, 718 F.3d at 1059 (finding no procedural unconscionability where the arbitration clause was not "buried in fine print," but was "in its own section, clearly labeled, in boldface"). The Court acknowledges that the opt out provision in the instant case is located in the middle of the second page of the Dispute Resolution Policy. However, *Ahmed* and *Uber* held that the location of an opt out provision "does not change [the procedural unconscionability] analysis." *Uber*, 848 F.3d at 1211 (citing *Ahmed*, 283 F.3d at 1200). Third, the opt out provision in the instant case specifically provided that Plaintiff "ha[d] the right to consult with counsel of his/her choice concerning this Policy." Dispute Policy ¶ 8. There is also evidence that Plaintiff in the instant case had an opportunity to ask questions about the Dispute Resolution Policy and its opt out provision. Specifically, Plaintiff signed an acknowledgement that he "received a copy of, had the opportunity to ask questions about, d[id] understand and agree[d] to abide by [the Dispute Resolution Policy]." Covarrubias Decl. Ex. B.

Despite the similarities to *Ahmed*, *Kilgore*, and *Uber*, Plaintiff argues that procedural unconscionability exists because there was a disparity of bargaining power between Plaintiff and Defendant and that the "take it or leave it" nature of the Dispute Resolution Policy makes the policy procedurally unconscionable. Specifically, Plaintiff argues that even though there is an opt out provision, the Dispute Resolution Policy is procedurally unconscionable because "an employee's failure to opt out within the specified time" in the opt out provision causes the Dispute Resolution Policy to be binding. Opp'n at 7. However, Plaintiff's arguments directly conflict with the holdings in *Ahmed*, *Kilgore*, and *Uber*. In all of of those cases, there was a disparity in bargaining power and the employee's failure to opt out of the provision at issue (an arbitration agreement in *Ahmed* and *Kilgore* and a delegation provision in *Uber*) in the specified amount of time caused the provision to be binding. In *Ahmed*, *Kilgore*, and *Uber*, the availability of a meaningful opt out procedure, even if limited in time, caused the agreements to not be procedurally unconscionable.

Accordingly, based on *Ahmed*, *Kilgore*, and *Uber*, the Court finds that the Dispute Resolution Policy is not procedurally unconscionable. Overall, because the Dispute Resolution Policy is neither substantively unconscionable nor procedurally unconscionable, Plaintiff's unconscionability challenge to the Dispute Resolution Policy fails.

D. Impermissible Claim Splitting

Plaintiff argues that granting the instant motion "may result in an illegal splitting of causes of action." Opp'n at 9. The rule preventing claim splitting is designed to "protect the defendant from being harassed by repetitive actions based on the same claim." *Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 328 (9th Cir. 1995) (internal quotations and citation omitted). "Claim splitting is generally prohibited by the doctrine of res judicata, which bars parties to a prior action[,] or those in privity with them[,] from raising in a subsequent proceeding any claim they could have raised in the prior action where all of the claims arise from the same set of operative facts." *Krueger v. Wyeth, Inc.*, 2008 WL 481956, at *3 (S.D. Cal. Feb. 19, 2008) (quoting *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 668 (D. Kan. 2004)). Res judicata bars a second action where "(1) the same parties, or their privies, were involved in the prior litigation, (2) the prior litigation involved the same claim or cause of action as the later suit, and (3) the prior litigation was terminated by a final judgment on the merits." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 952 (9th Cir.2002).

The California Supreme Court has addressed the issue of claim splitting in the context of class actions. "It is clear under California law a party cannot, as a general rule, split a single cause of action because the first judgment bars recovery in a second suit on the same cause. As a result, by seeking damages only for diminution in market value, plaintiffs would effectually be waiving, on behalf of the hundreds of class members, any possible recovery of potentially substantial damages-present or future. This they may not do." *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 464 (1974).

The motion to compel arbitration here would not result in claim splitting. The Dispute Resolution Policy requires that Plaintiff bring his claims in individual arbitration. The members of the purported class action class and collective action class will not be a party to that arbitration. Therefore, any decision in arbitration will have no effect on the other class members.

Accordingly, because the Dispute Resolution Policy does not conflict with the NLRA, is not unconscionable, and compelling arbitration would not result in impermissible claim splitting, the Court GRANTS Defendant's Motion to Compel Arbitration and Dismiss the Action, and DENIES Defendant's Alternative Motion to Stay the Action Pending Arbitration.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion to Compel Arbitration and Dismiss the Action, and DENIES as moot Defendant's Alternative Motion to Stay the Action Pending Arbitration.

IT IS SO ORDERED.

Dated: July 24, 2017

LUCY H. KOH
United States District Judge